

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

**75-7693
76-7023**

To be argued by
ROBERT C. OSTERBERG

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

TERRY GILLIAM, GRAHAM CHAPMAN, TERRY JONES, MICHAEL PALIN, JOHN CLEESE and ERIC IDLE, individually and collectively performing as the professional group known as "MONTY PYTHON,"

*Plaintiffs-Appellants-Appellees,
against*

AMERICAN BROADCASTING COMPANIES, INC.,
Defendant-Appellee-Appellant.

INTERLOCUTORY APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFFS-APPELLANTS-APPELLEES

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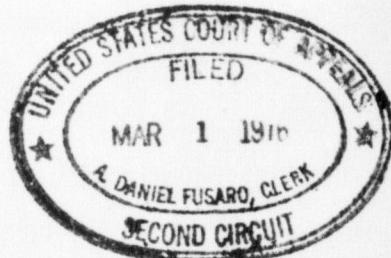


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BRIEF OF PLAINTIFFS-APPELLANTS-APPELLEES

INTRODUCTION

The respective appeals are from two determinations of the United States District Court for the Southern District of New York by the Honorable Morris E. Lasker. Plaintiffs (hereinafter collectively referred to as "Monty Python") appeal from the decision, findings of fact and conclusions of law entered on December 19, 1975, denying their application for a preliminary injunction. Defendant (hereinafter referred to as "ABC") appeals from the order entered on December 22, 1975, directing it to include a disavowal statement by Monty Python in the course of broadcasting edited versions of three separate Monty Python programs as a single nationwide network television special on December 26, 1975. Pursuant to ABC's application by order to show cause, dated December 22, 1975, this court (Gurfein, Hays and Timbers, C.J.J.) granted a stay on December 23, 1975, of the order appealed from by ABC. None of the prior proceedings are reported.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Should the creators of a television script recorded in the form of a television program be granted a preliminary injunction against exploitation of the program in a mutilated form by a television network upon a showing of destruction of the artistic integrity of their script and resulting irreparable injury to the creators if,

- (a) the creators show copyright ownership in the script, but not in the program;
- (b) the television network claims it acquired by mesne assignments from the creators' assignee greater editorial rights than the creators granted to their assignee;
- (c) neither the creators' assignee nor the television network's assignor is made party to the action; and
- (d) there is a continuing threat of future exploitation of mutilated programs by the television network?

STATEMENT OF THE CASE

Nature Of The Case And The Course Of Proceedings

This action was instituted by Monty Python to recover for common law copyright infringements, false descriptions and representations in commerce in violation of Section 43(a) of the Lanham Act, and unfair competition, all arising out of ABC's broadcast of network television "specials," each combining heavily truncated versions of three separate television programs written and made by Monty Python pursuant to their written agreements with The British Broadcasting Corporation (hereinafter referred to as "BBC"). (2a-7a)

Monty Python wrote the scripts for, and performed in, the thirty-minute television programs pursuant to their written agreements with BBC. By mesne assignments from BBC to Time-Life Films, Inc. (hereinafter referred to as "Time-Life") to ABC, ABC was granted the right to broadcast, and rebroadcast, as nationwide network television "specials," certain of the Monty Python programs. Monty Python asserts that ABC is not authorized to edit the Monty Python programs in any manner and has no right to broadcast any truncated versions thereof.

The summons and complaint were filed in the court below on December 15, 1975 and, on the same day, Monty Python

obtained an order directing ABC to show cause on December 16, 1975 why a preliminary injunction should not be entered enjoining ABC "...from directly or indirectly, on December 26, 1975, or at any other time, (a) broadcasting, (b) authorizing the broadcast of, (c) permitting the use of any of its facilities for the broadcast of or (d) in any way contributing to the broadcast of, Monty Python material written or performed by any of plaintiffs and licensed by plaintiffs to The British Broadcasting Corporation, unless the use of the Monty Python material (i) is broadcast in its entirety as originally written and performed by plaintiffs, and broadcast by The British Broadcasting Corporation, and (ii) is in all other respects within the scope of the license between plaintiffs and The British Broadcasting Corporation authorizing the use of such material for television purposes; ..." (8a, 9a) Following preliminary argument in Chambers on December 16, 1975, an evidentiary hearing was set for December 19, 1975. On December 19, 1975, an evidentiary hearing was held and at the conclusion thereof, the court below denied the application for a preliminary injunction, but invited Monty Python to seek an order compelling ABC to announce a statement of disavowal by them as part of ABC's nationwide network broadcast of a Monty Python "special" scheduled for December 26, 1975. (116a-119a)

On December 22, 1975, the court below, upon supplemental motion of Monty Python, ordered that the nationwide network television "special" scheduled to be broadcast on December 26, 1975, not proceed unless a specified disavowal of Monty Python be announced in the course of the broadcast. (141a) On December 22, 1975, ABC filed its notice of appeal from the order of the court below requiring the disavowal notice, and obtained an order to show cause from this court setting a hearing for December 23, 1975, on ABC's application for a stay of the order requiring use of the disavowal. (142a) On December 23, 1975, this court issued its order granting ABC's application for a stay. On January 5, 1976, Monty Python filed its notice of appeal from the order of the court below denying its application for a preliminary injunction.

Disposition Of The Court Below

The court below dictated its decision constituting its findings of fact and conclusions of law at the close of the evidentiary hearing on December 19, 1975. (113a-119a)

It was recognized by the court below that the "law favors the proposition that a plaintiff has the right under ordinary circumstances to protection of the artistic integrity of their (sic) work." (114a) The court below found that the editing of three one-half hour Monty Python programs into a single television special consisting of only sixty-eight minutes of actual playing time "caused the film or program in my view to lose its iconoclastic verve That the ... changes ... were made ... in good faith and for what may be considered sound professional requirements does not minimize the loss in esthetic or philosophic punch. Furthermore, the cut is a heavy cut. It is a cut of 22 minutes out of ninety minutes, which comes near the border at which one might say that the cuts, if not fatal, certainly made it very difficult for the patient to live in good health." (114a, 115a)

The court below concluded that the resulting damage to Monty Python from the mutilation "is irreparable

by its nature." (115a) Nevertheless, the court below denied "the injunction as requested" for the following reasons:

1. A "serious question of mixed fact and law as to who owns the copyright on the program we are talking about as distinct from the script, and as to the effect of that ownership if it is not in the plaintiffs."

(115a) The court below rejected Monty Python's argument that as a matter of law such copyright ownership was irrelevant because the contract between BBC and Monty Python strictly limits what uses may be made of the script material and ABC's rights could not be greater than BBC's rights.

2. A "question of fact and law as to whether BBC and Time-Life distributors are or are not indispensable parties to this litigation ... if that factor alone existed, I do not think it would interfere with my granting the injunction; it is certainly something to be considered in the balancing of the scales." (115a, 116a) During a preliminary hearing before the court below on December 16, 1975, when ABC raised the question of the joinder of such parties, the court below suggested that ABC bring them in as third-party defendants. (52a) ABC failed to make any effort to take such action, but Monty Python subpoenaed both BBC and Time-Life, together with their documentary evidence, for the evidentiary hearing. (88a; 104a; 112a) Representatives of both

BBC and Time-Life appeared and testified. (RD 15, Tr. 143, et seq.; 187, et seq.; 190, et seq.) During the course of the evidentiary hearing, the court below stated, "There is no motion pending before me to dismiss this action because of lack of indispensable party, and if there were, I believe I would deny it. I think that Judge Frankel ruled very conclusively on that point in a case of his that was referred to in the papers here by the plaintiffs [Jaeger v. American International Pictures, Inc., 330 F.Supp. 274 (S.D.N.Y. 1974)]. You are free, of course, and I suggested to you [ABC's counsel] the last time we met to bring in both Time-Life and I assume BBC as third-party defendants here." (52a)

3. "ABC will suffer significant financial loss if it is enjoined, though conceivably it might recover its monetary damages, if they occur, from Time-Life or BBC, or both." (116a)

4. ABC "has demonstrated that it will also suffer some irreparable damage if it is enjoined, including damage to its relations with affiliates, an implication of sloppiness of management, which I do not believe would be justified in the circumstances, and, finally, being put in an unfavorable light with the public and the Government." (116a)

5. A "somewhat disturbing casualness with which the plaintiffs pursued this matter until they brought it to court. I am referring to the events that preceded the 20th of November, not what has taken place since the 20th of November." (116a)

The court below added that it would consider a "motion for more limited relief ... for some kind of statement to be made on the show with regard to the content of the show. A disavowal by the plaintiffs..." (116a, 117a) Upon Monty Python's supplemental motion presented the next business day, the court below ordered the use of an author's disavowal in the broadcast of the nationwide television special scheduled for December 26, 1975. (141a) During the hearing on the supplemental motion, the court below said, "... I believe that the plaintiffs have rights to the protection of their literary endeavors which have survived the contract with BBC and that even if it should turn out to be proven, and I don't regard it as conclusively proven, although it is very likely, that BBC owns the copyright to the show, the program, that is, I do not believe that that is the end of the matter as far as the rights of plaintiffs are concerned." (120a, 121a)

STATEMENT OF THE FACTS

Monty Python is a group of professional entertainers formed in 1969, consisting of Terry Gilliam, an American artist residing in Great Britain; Graham Chapman, a British physician; Terry Jones, an Oxford University graduate and British professional writer; Michael Palin, an Oxford University graduate and British professional writer; John Cleese, a British lawyer; and Eric Idle, a Cambridge University graduate and British professional writer. (10a, 11a) The name "Monty Python" is a unique, fictional, arbitrary and fanciful name created by the group and is used to identify the group members and their unique brand of humor. (11a)

Monty Python acquired worldwide acceptance and popularity through thirty-minute television programs created for BBC as part of the comedy series entitled, "Monty Python's Flying Circus." (11a, 18a-20a) Monty Python has generated a large volume of publicity in the United States, including major articles in NEWSWEEK, TIME, THE NEW YORKER, VARIETY, TV GUIDE and most major newspapers. (11a) NEWSWEEK labels their BBC comedy series as "destined to become the most improbably successful program in the history of American public television." (18a) The phenomenal

popularity of Monty Python has been described as "Python-mania," which "threatens to turn into something resembling Beatlemania." (18a) In addition to their television series, Monty Python wrote and performed in two major motion picture productions exhibited in theatres throughout the United States, and four phonograph record albums sold throughout the United States. (11a, 12a) Two Monty Python books have been published. (12a) In the jargon of the entertainment business, Monty Python is a very "hot property."

Monty Python entered into scriptwriters' agreements with BBC, pursuant to which scripts are delivered to BBC for use in the television series. (29a-44a) BBC is authorized thereunder to make certain television uses of the scripts and, except for the rights specifically granted to BBC, Monty Python expressly retains all rights in the scripts. (34a, 42a, ¶ III) Each script delivered to BBC is required to be specifically written for a thirty-minute program in the Monty Python series. (29a, 37a) The scriptwriters' agreements specify in painstaking detail the procedures to be followed by BBC if it wishes to alter a script before the program derived therefrom is recorded. (34a, 35a; 42a, 43a) All alterations are to be made by BBC in consultation with Monty Python, except in limited

circumstances not pertinent hereto, and before a program is recorded. (34a, 35a; 42a, 43a; RD 15, Tr. 5-6) The scriptwriters' agreements do not grant to BBC any right to make alterations after a program is recorded. (29a-44a) All programs recorded by BBC are broadcast in their entirety as recorded. (11a) The scriptwriters' agreements grant to BBC an exclusive right to acquire an option to "... license the transmission of recordings of the work in any overseas territory ..." upon certain terms not pertinent hereto. (30a; 38a) The scriptwriters' agreements specifically define "the work" as the thirty-minute scripts. (29a)

All United States broadcasts of programs in the BBC television series, other than broadcasts by ABC, utilized the thirty-minute programs in their entirety, without interruption or editing. (12a) A large number of the programs were broadcast by 133 non-commercial educational television stations scattered throughout the United States. (12a) A commercial television station in Houston, Texas, and another in Las Vegas, Nevada, also broadcast a number of the programs. (12a)

By general written agreement, dated October 16, 1973, Time-Life acquired from BBC certain distribution rights in "BBC television programmes" for the United States. (134a-140a)

The written agreement provides that Time-Life "will not be permitted to adopt, edit or otherwise abridge or alter any BBC programmes without the consent of [BBC], except for insertion of commercials, applicable censorship or governmental (such as the Federal Communications Commission) rules and regulations, and National Association of Broadcasters (sic) and time segment requirements." (136a, 137a) There is no parallel provision authorizing any such changes to the recorded programs in the scriptwriters' agreements.

(136a) The Time-Life - BBC agreement further provides that licenses granted by Time-Life shall be in accordance with the terms of BBC's "current agreements with ... Copyright holders ..." (136a) ABC does not claim, and it was not shown, that Monty Python in any way approved the BBC - Time-Life general agreement.

In the Spring of 1975, ABC sought to acquire from Time-Life the right to broadcast over United States television facilities a ninety-minute compilation of sketches and material to be extracted from approximately thirteen recorded Monty Python programs. (13a) Monty Python unanimously rejected the proposal. (13a) Thereafter, in July, 1975, ABC entered into a written

memorandum with Time-Life, which purported to grant to ABC the right to broadcast two ninety-minute Monty Python "specials" compiled and edited from "six one-half hour" recorded Monty Python programs. (49a) Time-Life purported to grant to ABC the right to make two broadcasts of each of the "specials" before May, 1977, together with two options for an additional five and eight specials to be "compiled from material in 39 half-hour Monty Python Flying Circus Shows previously shown on the Public Broadcasting System."

(49a, 51a) The agreement provides that the specials are "to be edited to ABC's Wide World of Entertainment format," and "edited and otherwise made to fully conform to the policies of ABC's Department of Broadcast Standards and Practices." (50a) There is no parallel provision authorizing any such changes to the recorded programs in the scriptwriters' agreements. ABC does not claim, and it was not shown, that Monty Python in any way approved the Time-Life - ABC agreement.

In August, 1975, Monty Python's representative wrote to BBC, advised that she "gathered" a deal was made with ABC, and requested confirmation that no alterations

would be made in the recorded programs. (13a) By letter dated August 6, 1975, a representative of BBC responded that each of ABC's ninety-minute "specials" would consist of three recorded programs "shown in its entirety."

(14a) In September, 1975, Monty Python's representative again wrote to BBC questioning how each thirty-minute recorded program could be shown in its entirety by ABC if commercials are included in the "special." (15a) BBC's representative responded that he did not know what arrangements were made for commercials, but "we can only reassure you that ABC have decided to run the programmes 'back to back,' and that there is a firm undertaking not to segment them." (15a)

On October 3, 1975, ABC broadcast the first special and despite BBC's assurances to the contrary, this special was "mutilated and cannibalized;" "alterations totally destroyed the artistic and structural integrity of the scripts by deleting portions crucial to the Group's comedy ..." (15a, 16a) Monty Python first received a recorded copy of the "special" in London, in late November, 1975, and they were "appalled" at what had been done to their work. (16a) They found the "special" deleted many of the best portions of their programs and the retained material was thereby made weak, pointless and uncharacteristic. (16a)

A VARIETY critic who reviewed the special suggested it looked like selections were "pulled out of their original contexts to make a 90-minute pastiche." (21a)

After Monty Python viewed the first "special" in late November, 1975, Monty Python representatives sought to obtain a copy of ABC's second special in advance of any broadcast. (Hearing Ex. 1; RD 15, Tr. 20, 21; 37-40; 192) An ABC representative had advised a representative of Monty Python that ABC was not planning to schedule a broadcast of the second special until "early 1976," "either January or February." (id., at 31) In early December, 1975, a Monty Python representative discovered that the second special was scheduled to be broadcast on December 26, 1975. After prompt consultation with their London solicitor, Monty Python arranged for New York counsel to contact a representative of ABC. On December 9, 1975, ABC was requested to delay the scheduled broadcast until the special was reviewed by Monty Python and to make a copy of the special available. (id., at 195) This action followed and ABC never made a copy of the second special available for review by Monty Python until after this action was instituted.

The Mutilation Of The Programs

At the evidentiary hearing, Monty Python showed to the court below (a) the entirety of one of the recorded programs truncated for the ABC "special," and (b) ABC's truncated version. (87a, 88a) The original scripts were introduced into evidence. (Exs. 7-9) Two members of Monty Python testified at the evidentiary hearing and illustrated how the changes made in the recorded programs destroyed the artistic integrity of their work. (56a-95a) Some of the specific examples testified to are:

1. Military Trial Scene - The sketch is about a court martial in which counsel is trying to cross-examine a deserter. Counsel's examination is constantly interrupted by a judge who picks up on tiny, irrelevant references in counsel's questions and causes counsel to digress, much to counsel's annoyance. After many questions about irrelevancies, such as a town named Basingstokes and special gaiters, the whole trial process breaks down. The Monty Python point, developed by the persistent irritating interferences of the judge, was destroyed by ABC in eliminating the later portions where the trial process actually breaks down. In other words, they cut out the punch lines. (68a-70a)

2. British Upper Class Sitting Room Scene -

A very English upper class mother, father and daughter are talking about "woody" and "tinny" sounding words. The father in a fantasy world begins to mentally arouse himself with innocuous sexual words, such as "intercourse" and "pert thighs." Nothing happens other than his mental arousal, but his wife eventually gets up, finds a bucket of water and pours it over his head. The ABC cut eliminates the development of the sketch through the arousal and drenching, but retains the following sketch ending. As a result, ABC cuts from showing the father comfortably dressed to his soaken condition without any reason for the change in appearance. (71a, 72a)

3. Program Trailer - A segment taken from the middle of the recorded program, truncated and placed at the opening. References in the trailer to preceding portions of the recorded program no longer make sense because it precedes the references. (88a, 89a)

4. Deleted Jokes - Laughter of audience spills over on soundtrack beyond jokes and when ABC removed jokes, the laughter remained with no comical reference. (91a)

Monty Python creates a unified, intricately interwoven form for each thirty-minute program. All of the parts are interrelated and the overall form is as important as individual laughs. (92a-94a) Never before have recorded Monty Python programs been cut for television broadcasts. (75a; 81a) ABC destroyed the value of the form by its cuts, the "whole concept" was lost. (93a-94a)

Furthermore, plaintiff Michael Palin testified that the "essence of Monty Python is in the rather straightforward, down-to-earth, sometimes shocking, sometimes controversial approach ..." (73a) Plaintiff Terry Gilliam added "Python's reputation has grown because it is outspoken, it is honest, it is outrageous, it could even be offensive ..." (80a) "Here is a show that is outspoken, says what it wants to say, does extraordinary things, takes all sorts of chances, is not out to sell corn plaster or anything; it is out to entertain, surprise, enlighten even, the people viewing it." (81a, 82a) Both plaintiffs agreed that what was left after ABC's cutting was mere "pap," the programs were rendered "neuter," "bland." (74a, 81a)

ARGUMENT

Summary

As more fully appears infra, the court below erred in denying Monty Python's application for injunctive relief for the following reasons:

1. There is no "serious question of mixed fact and law as to who owns the copyright" in the recorded programs and the effect of that ownership. (115a) Monty Python made no claim to ownership of such copyright and the recorded program bears a copyright notice in the name of BBC. (RD 15, Tr. 197) The recorded program is merely a derivative work and its uses are limited by the terms of the scriptwriters' agreements authorizing the use of the basic work. As a matter of law, BBC could not grant rights to use the derivative work in a manner not authorized in its license from Monty Python to use the basic work.

2. There is no "question of fact and law" as to whether BBC and Time-Life are indispensable parties. (115a) The court below resolved that question during the course of the hearing stating (a) there was no pending motion to dismiss, and (b) if there were, he would deny it. (52a)

3. The court below balanced the equities solely with respect to the facts surrounding the scheduled performance. None of the balancing factors are pertinent to Monty Python's right to enjoin future performances, currently unscheduled. Furthermore, the court below ignored pertinent balancing standards, including by weighing monetary loss to ABC against irreparable injury to Monty Python. There was no evidence of any legally cognizable irreparable harm to ABC which would result from issuance of the injunction.

The court below found that ABC seriously mutilated the Monty Python programs, caused a loss of "iconoclastic verve," and "esthetic or philosophic punch" as a result of the "heavy cut;" (114a) that the resulting damage to Monty Python is "irreparable by its nature;" and that the law favors "protection of the artistic integrity of an author's work." (114a) ABC claims a contractual right to rebroadcast its mutilated versions of Monty Python programs, and testified it intends to rebroadcast, as well as to perpetrate further mutilations through its options to edit thirteen additional "specials" out of 39 recorded Monty Python programs. (49a, 51a, 96a-98a) The court below clearly erred when it failed to grant the requested injunctive relief against the rebroadcasts and future "specials." (8a)

POINT I

ANY QUESTION SURROUNDING
OWNERSHIP OF COPYRIGHT IN
THE RECORDED PROGRAM IS
IRRELEVANT

(A) ABC Could Not Have Acquired Greater Rights Than BBC
Had To Make Editorial Changes.

ABC claims it acquired the right to substantially alter the recorded Monty Python programs by its agreement with Time-Life, which acquired whatever rights it had from BBC. The scriptwriters' agreements, pursuant to which BBC acquired the rights to use Monty Python script material, are specifically limited to (1) the right to license in the United States, the recorded program made from the thirty-minute script; (30a; 38a) (2) a personal authorization to BBC only to make alterations in the script, in consultation with Monty Python; (34a, 35a; 42a, 43a) and (3) a restriction on the right to make alterations, to the period prior to the completion of the recording of the program.

(ibid.) Monty Python expressly retained all rights to the use of the script not expressly granted to BBC. (34a; 42a)

As the Court of Appeals for the Ninth Circuit said in *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 103 (9 Cir. 1960) in applying the legal axiom that a grantor cannot convey greater rights than it owns:

"The power gained by Kodascope under the 1927 agreement was to make miniature reproductions of certain photoplays and to license the use thereof 'for strictly non-theatrical exhibitions.' It is not contended that appellant has been using 'The Covered Wagon' for a non-theatrical exhibition."

* * * *

"While Kodascope may have purported to unconditionally sell a positive print, its only authority from Paramount was to reproduce miniature prints and license them for non-theatrical use.

It follows that appellant's commercial exhibition of 'The Covered Wagon' is not authorized by any power which Paramount placed in the hands of Kodascope by virtue of the 1927 contract."

- (B) Monty Python Is The Proprietor Of The Common Law
Copyright In The Scripts And Any Permissible Use
Of The Scripts Is Restricted By The Scope Of Their
License To BBC.

It is uncontested that the Monty Python scripts are unpublished and Monty Python is the proprietor of the common law copyright therein. (11a; 34a; 42a) There is no grant from Monty Python to use their copyrighted script material other than as recorded by BBC in a thirty-minute program.

In *Field v. True Comics*, 89 F.Supp. 611 (S.D.N.Y. 1950), the court said, with respect to a license to use copyrighted material, at p. 613:

"Plaintiff's rights in the copyright are of a very limited character -- only the right to publish the copyrighted work in book form in the United States. DiMaggio specifically reserved to himself all other rights in the copyrighted work, and could, of course, have licensed or permitted True Comics to publish the copyrighted work in any manner except in book form, and plaintiff's rights would not be violated. See *Tully v. Triangle Film Corp.*, D.C.S.D.N.Y., 229 F.297; *Eliot v. Geare-Marston, Inc.*, D.C.E.D. Pa., 30 F.Supp. 301."

In *Philipp v. Jerome H. Remick*, 145 F.Supp. 756 (S.D.N.Y. 1936), the court below recited the rule that in construing an agreement whereby an author grants an interest in his copyrighted material, "any doubts should be resolved in favor of the composer. The clearest language is necessary to divest the author of the fruits of his labor."

Any use of copyrighted material beyond the scope of a license issued therefor is an infringing use.

The *Robert Stigwood Group Limited v. Sperber*, 457 F.2d 50 (2 Cir. 1972), at pp. 52, 53:

"OATC's claims that its productions do not infringe Stigwood's rights is based upon the usual and customary agreement between the American Society of Composers, Authors and Publishers ('ASCAP') and Leeds Music Corporation, as ASCAP member."

* * * *

"Both parties and the court agree, therefore, that selections from *Jesus Christ Superstar* can be properly presented by

ASCAP licensees if they are presented in 'nondramatic' performances. See generally M. Nimmer, Copyright § 125.6 (1971). Accordingly, we must decide if OATC's performances fall into the 'dramatic' or 'nondramatic' category."

Eliot v. Geare-Marston, Inc., 30 F.Supp. 301, 305 (E.D. Pa. 1939).

Twentieth Century Fox Film Corp. v. People's Theatres, 24 F.Supp. 793, 795 (M.D. Ala. 1938).

Famous Music Corp. v. Melz, 28 F.Supp. 767, 769 (W.D. La. 1939).

(C) Any Copyrights In The Recorded Programs Do Not Enlarge The Right To Use The Underlying Script Material.

A copyright in a derivative work does not affect the force or validity of the copyright in the basic work and merely affords copyright to the new elements of authorship in the derivative work. Nom Music, Inc. v. Kaslin, 343 F. 2d 198 (2 Cir. 1965).

As the court below said in Rohauer v. Killiam Shows, Inc., 379 F.Supp. 723, 727 (S.D.N.Y. 1974), citing and discussing numerous supporting authorities:

"Defendant argues, as I understand it, that the motion picture is an independently copyrighted derivative work, the use of which cannot be controlled by the holder of the renewal copyright in the underlying work. Although the view is hardly illogical, I can find no support for it in the applicable precedents; as I have already noted, such precedents as do exist repudiate this argument."

POINT II

MONTY PYTHON HAVE A RIGHT TO PREVENT
MUTILATION OF THEIR ARTISTIC PRODUCT
EVEN IN THE ABSENCE OF A RIGHT UNDER
CONTRACT OR COPYRIGHT

During the hearing on the supplemental order, the court below recognized that Monty Python "have rights to the protection of their literary endeavors which have survived the contract with BBC...." (120a, 121a)

As this court said in *Granz v. Harris*, 198 F. 2d 585 (2 Cir. 1952), at p. 589 (Frank, C. J., concurring):

"I agree, of course, that, whether by way of contract or tort, plaintiff (absent his consent to the contrary) is entitled to prevention of the publication, as his, of a garbled version of his uncopyrighted product."

* * * . *

"Whether the work is copyrighted or not, the established rule is that, even if the contract with the artist expressly authorizes reasonable modifications (e.g. where a novel or stage play is sold for adaptation as a movie) it is an actionable wrong to hold out the artist as author of a version which substantially departs from the original. Under the authorities, the defendant's conduct here, as my colleagues say, may also be considered a kind of 'unfair competition' or 'passing off'. The irreparable harm, justifying an injunction, becomes apparent when one thinks what would be the result if the collected speeches of Stalin were published under the name of Senator Robert Taft, or the poems of Ella Wheeler Wilcox as those of T.S. Eliot."

In Fairbanks v. Winik, 206 App. Div. 449, 450, 451 (1 Dept. 1923), the Appellate Division of the State of New York said in reversing the denial of a preliminary injunction under similar circumstances:

"The plaintiff entered into a contract with the Majestic Motion Picture Company under the terms of which he was to render services to said company in the making of motion picture films. It was provided by said contract that the direction of all pictures in the making of which the plaintiff participated should be supervised by David Griffith, the general manager and chief director of said corporation; and that in the event of said Griffith severing his connection with the company or discontinuing the active management of the same, the plaintiff might at his option withdraw from active employment in said corporation. Pursuant to said contract a number of pictures in which the plaintiff acted the chief part were made under the supervision of Mr. Griffith and released.... The rights and assets of the Majestic Company were acquired by the Triangle Film Corporation, and the latter assigned to the defendant Hyman Winik the alleged right to re-edit and reconstruct the pictures in which the plaintiff had appeared."

* * * *

"It is clear that the plaintiff at all times considered the supervision of Mr. Griffith a very important factor in his work, and that his contract with the Majestic Corporation was originally conditioned upon his having the benefit of such supervision. In view of the contractual obligation concerning the supervision of direction by Mr. Griffith, the approval of the stories to be filmed and the right to inspection of the completed photoplay by the plaintiff,

there is sufficient shown to restrain the threatened action of cutting down the four-and five-reel plays into two-reel plays, and to hold the rights of the parties in statu quo until evidence at the trial can resolve more fully the respective rights of the parties."

In Drummond v. Altemus, 60 Fed. 338 (C.C.E.D. Pa. 1894), the court said at p. 339:

"The defendant's book is founded on the matter which had appeared in the British Weekly, and, if that matter had been literally copied, and so as not to misrepresent its character and extent, the plaintiff would be without remedy; but the fatal weakness in the defendant's position is that, under color of editing the author's work, he has represented a part of it as the whole, and even, as to the portion published, has materially departed from the reports which he sets up in justification."

* * * *

"A most important circumstance in this connection is that the defendant, while precisely adopting his title from the headlines of the reports, has so altered their text as to make it appear, contrary to the whole tenor of the reports themselves, that what his book contains is the precise language of the author of the lectures, although, as has been said, it contains only some of the lectures, not all of them, and presents none of them fully or correctly. The complainant's right has been fully made out, and the case shown is manifestly one which calls for the interposition of the court at this stage. An order will be made for a temporary injunction."

POINT III

IT IS A VIOLATION OF SECTION 43(A) OF THE
LANHAM ACT TO DESCRIBE MUTILATED PROGRAMS
AS MONTY PYTHON PRODUCT

ABC broadcast as the MONTY PYTHON SHOW the "specials" consisting of the heavily cut, mutilated Monty Python programs. The failure of ABC to disclose the true facts concerning the abbreviated nature of its "specials" is a misdescription and misrepresentation in commerce prohibited by Section 43(a) of the Lanham Act (15 U.S.C. §1125 (a)).

Section 43(a) of the Lanham Act (15 U.S.C. §1125 (a)) provides:

§1125. False designations of origin and false description forbidden. (a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods,... any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, shall be liable to a civil action by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

As the court below said in the leading case entitled Geisel v. Poynter Products, Inc., 283 F. Supp. 261 (S.D.N.Y. 1968), at pp. 267, 268:

"In determining whether defendant's

actions have violated Section 43(a), it is necessary to point out that the phrase 'false designation of origin' is not limited to geographic origin. Rather, this statutory language 'covers any representation with respect to the originator of a product i.e. a particular source of manufacture by a certain business'" (Citations omitted) "Similarly a 'false representation,' whether express or implied, that a product was authorized or approved by a particular person is actionable under Section 43(a)," (Citations omitted) "Liability under the statute is not restricted solely to descriptions and representations that are literally false. Relief may be granted if the actions of the defendants create a false impression." (Citations omitted.) "The plaintiff is not required to prove actual palming off, Glenn v. Advertising Publications, Inc. 251 F. Supp. 889, 903 (S.D.N.Y. 1966). A showing of the likelihood of customer confusion as to the source of the goods is sufficient." (Citations omitted). "For injunctive relief to be granted, there is no requirement that plaintiff show that customers were actually deceived by the alleged misrepresentation or that there was an actual diversion of business. Plaintiff need only demonstrate that the false representations 'have a tendency to deceive'" (Citations omitted).

In Rich v. RCA Corporation, 390 F. Supp. 530 (S.D.N.Y. 1975), the court below said at pp. 530, 531:

"Plaintiffs claim that defendant's use of Rich's current likeness on this album of old recordings violates Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), since it misleads the public to believe that the record album contains recently recorded songs."

* * * *

"In light of all the indisputable facts, it is clear that the current picture of Rich on the record jacket, without a prominent notation that the songs in the album were recorded over a decade ago, is likely to deceive and confuse consumers as to the true contents of the package by misleading them to believe that the album contains songs recently recorded by Rich."

* * * *

"Accordingly, plaintiffs are entitled to a preliminary injunction enjoining defendant from further sales of the record album and tape recording of 'Charlie Rich -- She Called Me Baby' in its present jacket bearing the current likeness of Rich."

It is not necessary for a claim based upon violation of said Act to be grounded upon a registered trade or service mark.

Mortellito v. Nina of California, Inc., 335 F. Supp. 1288 (S.D.N.Y. 1972) at p. 1294.

POINT IV

THERE IS NO VALID REASON TO
DENY MONTY PYTHON'S APPLI-
CATION FOR A PRELIMINARY
INJUNCTION

The reasons advanced by the court below for denying the application for a preliminary injunction are either not applicable or not supportable.

Indispensable Parties -

The court below recognized that neither Time-Life nor BBC is an indispensable party, following the ruling by Judge Frankel in Jaeger v. American International Pictures, Inc., 330 F.Supp. 274 (S.D.N.Y. 1974). Furthermore, ABC made no motion addressed to lack of parties and ignored the suggestion of the court below that ABC bring in Time-Life and BBC as third-party defendants.

ABC's Financial Loss -

Representatives of ABC suggested its financial loss if the "special" scheduled for broadcast on December 26, 1975, were cancelled would be about \$131,000, plus legal fees. (RD 15, Tr. 120) No part of that amount relates to a loss flowing from a non-scheduled broadcast. Furthermore, all resulting money damages could be adequately compensated by a damage award.

ABC's Alleged Irreparable Damage -

The purported damages all relate to cancellation of the scheduled broadcast. However, the testimony showed that ABC's claim was frivolous. For example, "damage to its relations with affiliates" (116a) was merely "irritation," they get "very cranky when we do make program schedule changes;" (106a, 107a) and "unfavorable light with the public and the Government," (116a) was merely "people who would be interested in Monty Python will certainly be annoyed and irritated with the program that is not there." (107a) There was no evidence with respect to ABC's relations with the government.

Alleged Casual Pursuit by Monty Python -

During the months prior to November 20, 1975, Monty Python was repeatedly assured by BBC that there would be no cuts by ABC (See supra, pp. 14-16). The record does not support the finding of the court below.

CONCLUSION

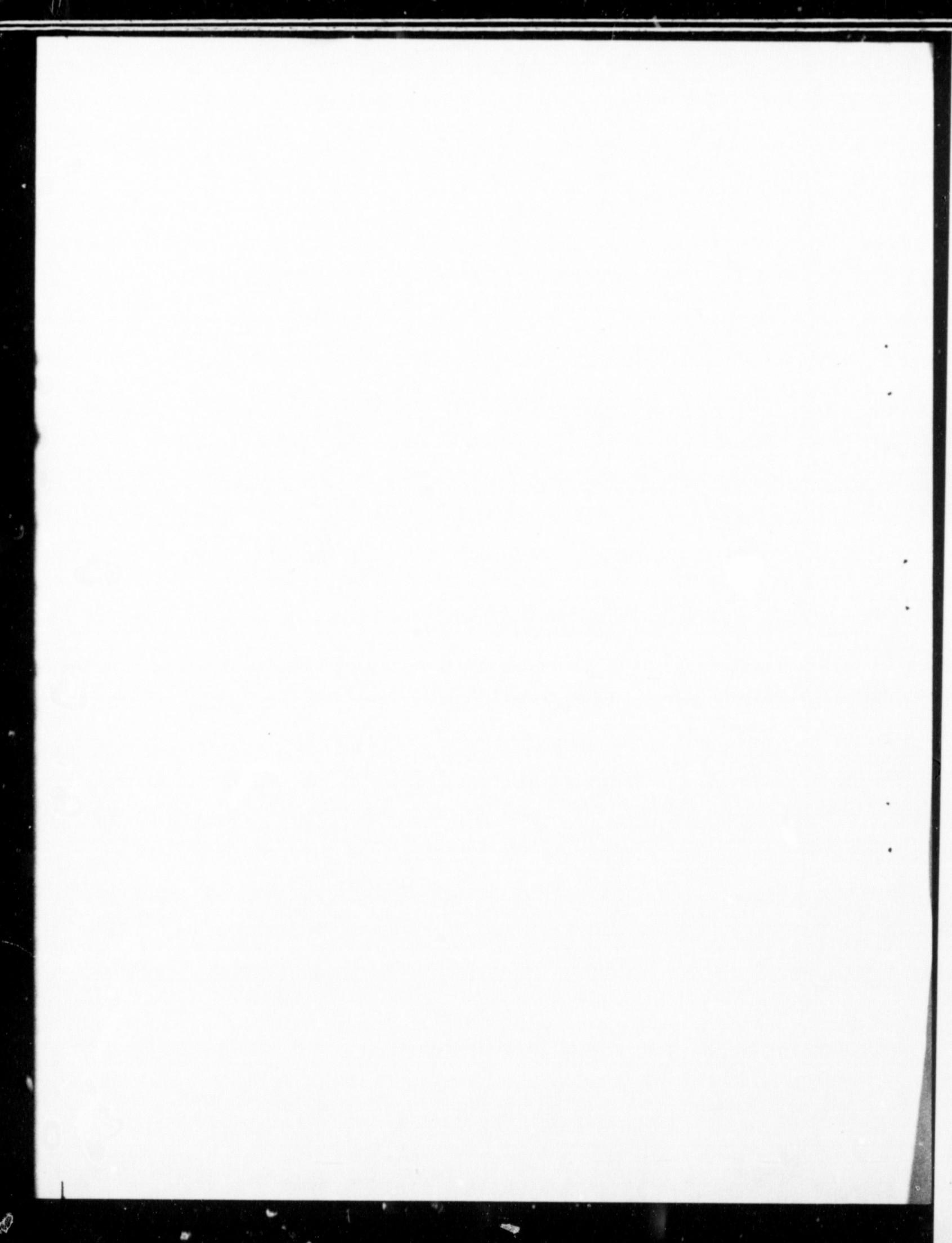
It is respectfully submitted that the decision of the court below should be reversed and the cause remanded with instructions to enter an injunction as prayed for in the application of Monty Python.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TERRY GILLIAM, et al., : Calendar Nos.
Plaintiffs-Appellants-Appellees, : 75-7693
76-7023

-against- :
AMERICAN BROADCASTING COMPANIES, INC., : AFFIDAVIT OF
Defendant-Appellee-Appellant. : SERVICE

STATE OF NEW YORK } SS.:
COUNTY OF NEW YORK }

RAYMOND BRODY, being duly sworn, deposes and says:

1. I am not a party to the action, am over 18 years of age, and reside at New York, New York.
2. On February 27, 1976, I served the brief of plaintiffs-appellants-appellees upon Pryor, Cashman & Sherman, attorneys for defendant-appellee-appellant, at 410 Park Avenue, New York, New York 10022, the address designated for that purpose by depositing two true copies of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Raymond Brody
RAYMOND BRODY

Sworn to before me this

1st day of March, 1976.

Leitha M. Gutleber

LEITHA M. GUTLEBER
Notary Public, State of New York
No. 41-6757255
Qualified in Queens County
Cert. Filed in Queens County
Commission Expires March 30, 1976

